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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1429

PARTICULAR CLEANERS, INC. AND
FRANCES ENTWISTLE,
Petitioners,

vs.

COMMONWEALTH EDISON COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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June 7, 1972.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT OF THE CASE.

The complaint in this case was dismissed by the United States District Court for the Northern District of Illinois on March 15, 1971. The petition for a writ of certiorari seeks a review of the decision of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint. The Seventh Circuit's opinion is reported at 457 F. 2d 189.

The Complaint.

The complaint, brought as a "civil rights action" challenged respondent Commonwealth Edison Company's ("Edison's") policies of requiring security deposits from its prospective customers [Petition, pp. A19-21]. Respondent is a privately owned company which provides electric utility service to customers in the Chicago metropolitan area [Petition, p. A18].

The individual plaintiffs, a corporation apparently engaged in a dry cleaning business and an English citizen living in Chicago, purported to bring the case as a class action on behalf of all persons required to make security deposits as a condition of obtaining electric service [Petition, p. A18].

Essentially, the complaint charged that it was "arbitrary, capricious and discriminatory" for Edison to require certain customers to make deposits before beginning service while not requiring such deposits from other customers [Petition, pp. A19-21]. Plaintiffs alleged that "thousands of prospective purchasers of electric service . . . are arbitrarily and discriminatorily required to pay a security deposit based upon unequal and discriminatory standards and policies *arbitrarily dictated by numerous representatives of Defendant, Commonwealth Edison Company*" [Petition, p. A19, emphasis supplied.] The complaint did not state in what way any such security deposit policies of Edison were unequal or unfair. It did not even state what policies were complained of. Although the petition for a writ of certiorari [Petition, p. 5] alludes to deposit requirements being based on "sex, residence location and race", there are absolutely no allegations in the complaint (nor anywhere else in the record) as to any such discrimination.

Count I of the complaint charged that Edison's security deposit policies deprived plaintiffs of equal protection of the law and alleged that Edison's action was under color of an Illinois Commerce Commission regulation [Petition, p. A21]. Count II, based on asserted pendent jurisdiction, alleged a violation of Illinois utility laws dealing with rate discrimination [Petition, p. A16].

Under Illinois law, the Illinois Commerce Commission (the "Commission") has power to adopt regulations and to consider customer complaints concerning utility rates or service. [*Ill. Rev. Stat.*, ch. 111⅔, § 68 (1971)]. No Commission order or regulation in any way directs or orders the collection of any security deposits. The Commission's General Order 172 does provide *limitations* on the power of public utilities to require security deposits, restricting the amounts of such deposits and providing for return of deposits with 7% interest [Petition, pp. A2-8].

The Decisions Below.

Respondent moved to dismiss Count I on the grounds that there was no allegation of state action and that the complaint failed properly to allege any invidious or impermissible classification with regard to security deposits. Respondent moved to dismiss Count II, the pendent jurisdiction claim, because of the lack of jurisdiction over Count I and also on the ground that under Illinois law, the Illinois Commerce Commission has primary jurisdiction over claims as to public utility rate discrimination. The complaint had not alleged that petitioners had exercised their available remedies before that Commission.

The District Court granted Edison's motion to dismiss. In affirming the decision of the District Court, the Court of Appeals held that the complaint was deficient because the complained of actions of Edison did not constitute state

action. The opinion of the Court of Appeals specifically stated:

> "The complaint does not challenge the propriety of the action of the Illinois Commerce Commission or the order itself. It complains of 'the standards and policies arbitrarily dictated by numerous representatives of' Edison. The order in no way directs or orders the collection of any security deposits. It merely serves to limit the powers of public utilities to require deposits. There is no allegation that a public utility could not require such a deposit without this regulation. The decision to require security deposits to insure credit and its application of this policy in any particular case is strictly a private management decision to be made by Edison in its own normal business operation. Edison is neither the State of Illinois nor an agency thereof. We fail to see how the execution of these policies by Edison in the context of the case before us could constitute state action." [Petition, p. A12.]

ARGUMENT.

Respondent respectfully submits that this case is not an appropriate one for the issuance of a writ of certiorari. The decision of the Seventh Circuit follows the decisions of other federal courts on the issue of state action in civil rights claims against public utilities. There is no conflict of circuits. Moreover, the failure of the complaint to allege any invidious or impermissible classification makes this case a poor vehicle to test the application of equal protection claims to privately owned utility companies.

I.

There Is No Conflict of Decisions.

The decision of the Court of Appeals is in accord with federal court decisions holding that normal business actions of public utility corporations, even though subject to

state utility regulation, do not constitute state action for purposes of civil rights litigation. *Kadlec* v. *Illinois Bell Telephone Co.*, 407 F. 2d 624 (7th Cir. 1969), *cert. den.* 396 U. S. 846 (1969) [no state action in civil rights claim where utility customer was placed on less advantageous telephone rate pursuant to regulations filed with state utility commission]; *Lucas* v. *Wisconsin Electric Power Co.*, 322 F. Supp. 337 (E. D. Wisc. 1970) [no state action in civil rights claim where electric service was discontinued pursuant to cut-off policy regulated by state utility commission]; and *Martin* v. *Pacific Northwest Bell Telephone Co.*, 441 F. 2d 1116 (9th Cir. 1971), *cert. den.* 404 U. S. 873 (1971) [no state action in civil rights claim as to allegedly improper discharge of utility employee].

Nor is the decision of the Seventh Circuit in this case in conflict with Fourth and Fifth Circuit anti-trust cases cited by petitioners, *Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, 438 F. 2d 248 (4th Cir. 1971); and *Gas Light Co.* v. *Georgia Power Co.*, 440 F. 2d 1135 (5th Cir. 1971), *cert. den.* 404 U. S. 1062 (1972). Neither of the cited cases involved state action in a civil rights context. Rather, these cases involved applications of the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), exempting certain state approved practices from federal anti-trust laws.

Each of the cited anti-trust cases concerned the use by a utility of allegedly unfair rates, themselves state regulated, to expand an existing monopoly position made possible only by the state utility regulation. These cases presented far more significant state regulatory involvement in the complained of activities than does the case at bar. They are not in conflict with the principal applied by the Seventh Circuit that normal business decisions of public utilities such as the requiring of security deposits do not constitute state action within the meaning of the Fourteenth Amendment.

II.

The Complaint Does Not Allege Any Unconstitutional Discrimination.

More importantly, this case is a very poor vehicle to test the applicability of the equal protection clause to actions of privately owned utility companies. The complaint failed to allege any impermissible classification or invidious discrimination with regard to Edison's security deposit policy. It simply alleged that some customers were required to make deposits and others were not. Without any elaboration, the complaint concluded that the security deposit practices were "arbitrary, capricious and discriminatory" [Petition, pp. A19-21]. *There was absolutely no allegation of any racial, sexual, religious, political or any other improper classification among customers.* Indeed, in no way did the complaint state in what respect any classification or distinctions as to security deposits was improper or invidious.

The failure of the complaint to allege any improper or invidious classification not only provided an additional ground for dismissal of the action, it makes the case especially inappropriate for review by this Court. Without at least some more particular statement of what is complained of, the case is not one which could provide a useful vehicle for explication of constitutional principles.

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari fails to present an important national issue appropriate for resolution by this Court. The Petition should be denied.

Respectfully submitted,

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June 7, 1972.